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## Giving Power Back to the Passengers: The Airline Passengers' Bill of Rights

Zachary Garsek

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# GIVING POWER BACK TO THE PASSENGERS: THE AIRLINE PASSENGERS' BILL OF RIGHTS

ZACHARY GARSEK\*

## TABLE OF CONTENTS

I. INTRODUCTION.....	1188
II. THE DEREGULATION ACT OF 1978.....	1190
A. FACTORS LEADING UP TO THE DEREGULATION ACT OF 1978 .....	1190
B. EFFECTS OF THE DEREGULATION ACT OF 1978...	1191
III. PROPOSALS FOR IMPROVING AIRLINE CUSTOMER SERVICE .....	1192
A. EARLY PROPOSALS: THE AIRLINE PASSENGER BILL OF RIGHTS AND THE AIRLINE PASSENGER DEFENSE ACT OF 1990 .....	1192
B. HOUSE BILL 700: THE AIRLINE PASSENGER BILL OF RIGHTS ACT OF 1999 .....	1194
1. <i>Language of House Bill 700</i> .....	1195
2. <i>Testimony</i> .....	1197
a. Statement of Richard B. Hirst, Senior Vice President for Corporate Affairs, Northwest Airlines, Inc.....	1198
b. Statement of Robert P. Warren, Senior Vice President, General Counsel & Secretary, Air Transport Association of America.....	1201
c. Statement of Edward J. Driscoll, President and Chief Executive Officer, National Air Carrier Association .....	1204
d. Testimony of the American Society of Travel Agents, Inc.....	1205
C. SENATE BILL 383: AIRLINE PASSENGER FAIRNESS ACT .....	1207

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\* B.B.A, Emory University, 1998; J.D., Southern Methodist University School of Law, 2001.

1.	<i>Language of Senate Bill 383</i> .....	1208
2.	<i>Testimony</i> .....	1209
	a. Statement of Senator John McCain, Chairman Senate Committee on Commerce, Science, and Transportation .....	1209
	b. Testimony of Jeannie Johanningmeier: Northwest Airlines Passenger During the Detroit New Year's Weekend Blizzard .....	1210
	c. Testimony of Darlene McCord: United Airlines Passenger .....	1211
	d. Statement of Nancy E. McFadden, General Counsel, United States Department of Transportation.....	1212
	e. Statement of Carol B. Hallett, President and Chief Executive Officer, Air Transportation Association of America.....	1217
IV.	RESPONSE TO PROPOSALS .....	1219
	A. AIRLINE RESPONSE .....	1219
	1. <i>Placing the Blame for Poor Customer Service</i> ...	1219
	2. <i>Customers First</i> .....	1220
V.	CONCLUSION.....	1222

## I. INTRODUCTION

ON JANUARY 2, 1999, Northwest Airlines caged hundreds of passengers inside planes at Detroit's Metro Airport in excess of seven hours. The passengers, whose flights were aborted by hazardous snowy conditions, waited as crews prepared for them to return to the gate.<sup>1</sup> While food and water supplies dwindled, the flight crew did little to answer the passengers' concerns.<sup>2</sup>

At one point, I told an attendant that my children hadn't eaten since 7 A.M. She said there wasn't anything they could do because there was no food. The plane's supply of peanuts, pretzels

<sup>1</sup> See *World News Tonight: Air Passengers' Rights, Government Hears Travelers' Horror Stories* (ABC television broadcast, Mar. 10, 1999).

<sup>2</sup> See *Airline Passenger Fairness Act: Hearing on S. 383 Before the Senate Comm. on Commerce, Science, and Transport.*, 106th Cong. (1999) (statement of Jeannie Johanningmeier) (Northwest Airlines passenger who boarded a flight in Detroit at 2:30 p.m. on New Year's Weekend) [hereinafter *Johanningmeier Statement*].

and sodas had run out. We would go hours without hearing a word from the crew.<sup>3</sup>

The condition of the airplane's environment rapidly degraded, including the treatment that customers received from airline personnel. "At about the fifth hour on the plane, the tanks from the lavatories began to overflow, making them unusable."<sup>4</sup> "During the nine hours that we were forced to wait, we were repeatedly remanded to our seats if we tried to stand up."<sup>5</sup> Episodes like the Detroit New Year's Eve debacle and a decrease in the overall level of customer service has forced Congress to consider promulgating legislation that will have the most profound effect on the airline industry since the Airline Deregulation Act of 1978. The House of Representatives unveiled its first proposals on October 25, 1989 with the introduction of House Bill 3528, Representative Pete Stark's Airline Passenger Bill of Rights<sup>6</sup> and Representative Don Ritter's Airline Passenger Defense Act of 1990.<sup>7</sup> While these resolutions did not pass, the proposals received significant support in the House of Representatives. "The lack of head-to-head competition for flights in the airline industry has led to a decline in the quality of passenger services."<sup>8</sup> Alfred Kahn, an authority on airline deregulation, has stated that deregulation can continue to function "only in the presence of effective competition as the protector of consumers."<sup>9</sup> The airlines have opposed new regulation since the Stark proposal. Bill Jackman, the spokesman for the Air Transport Association, comprised of America's major airlines, stated that, "[w]e don't think the Stark bill deals with the real issues. . . . Our concern is with the state of the infrastructure of the air transport system. We need to improve and upgrade airports and runways and equipment that can lessen delays."<sup>10</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *World News Tonight*, *supra* note 1 (Northwest passenger Barbara Plecas recalling her New Years Eve weekend experiences at Detroit Metro Airport).

<sup>5</sup> *Id.* (Virgin Airlines passenger Patricia Shank).

<sup>6</sup> Peter S. Greenberg, *House Bill Aims High for Rights of Air Travelers*, ST. PETERSBURG TIMES, Feb. 11, 1990, at 2E.

<sup>7</sup> 136 CONG. REC. E2624 (daily ed. Aug. 3, 1990) (statement of Rep. Don Ritter) [hereinafter Ritter Statement].

<sup>8</sup> *Id.*

<sup>9</sup> *Hearing on Aviation Passengers Protection, H.R. 700, H.R. 780, & H.R. 908 Before the House Comm. on Transp. & Infrastructure.*, 106th Cong. (1999) (testimony of Paul M. Ruden, Esquire, Acting Chief Operating Officer, American Society of Travel Agents, Inc.) [hereinafter Ruden Testimony].

<sup>10</sup> Greenberg, *supra* note 6.

Since the failed Stark Bill, Congress has proposed two new measures for protecting airline passengers' rights: House Bill 700, the Airline Passenger Bill of Rights Act of 1999,<sup>11</sup> and Senate Bill 383, the Airline Passenger Fairness Act.<sup>12</sup> These proposals have been met with harsh opposition from the airline lobby, resulting in a trial period in which the airlines themselves can try to improve customer service through a "voluntary" plan called Customers First.<sup>13</sup>

Congress, the airlines, and consumers have presented compelling arguments in support of and against enacting such legislation. With these arguments in mind, this comment suggests that if the Customers First plan proves fruitless, the state of customer service in the airline industry has disintegrated to the point that some government regulation is necessary.

## II. THE DEREGULATION ACT OF 1978

### A. FACTORS LEADING UP TO THE DEREGULATION ACT OF 1978

President Jimmy Carter signed the Airline Deregulation Act into law on October 28, 1978.<sup>14</sup> Prior to that date, the Civil Aeronautics Board (CAB) dictated the routes that each airline could fly and reviewed the prices that airlines charged.

The Act was passed after years of increasing pressure from several sources during the mid-1970s. For many years, economists insisted that unregulated airfares on interstate flights would result in lower fares for travelers. In addition, the development of wide-body aircraft increased airline capacity. Furthermore, the Arab oil embargo of 1973 meant that higher fuel prices required the airlines to get the most out of their energy dollar. Thus, the airlines pushed for more freedom in both routing and pricing. Congress partially granted this wish in November 1977 when it began allowing airlines to set their own prices and operate on any domestic route. Deregulation became complete with the Deregulation Act of 1978.<sup>15</sup>

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<sup>11</sup> H.R. 700, 106th Cong. (1999).

<sup>12</sup> S. 383, 106th Cong. (1999).

<sup>13</sup> See Air Transport Association, *Press Release: Airlines File Customer Service Plans Carriers to Improve Service with Wide-Ranging Program*, at <http://www.air-transport.org/public/news/446.asp> (Sept. 14, 1999) [hereinafter *ATA Press Release*].

<sup>14</sup> See Air Transport Association, *Airline Handbook: Chapter 2 Deregulation*, at <http://www.air-transport.org/public/Handbook/CH2.htm> (last visited on Sept. 22, 1999).

<sup>15</sup> See *id.*

## B. EFFECTS OF THE DEREGULATION ACT OF 1978

Deregulation directly contributed to many significant changes in the airline industry: the hub and spoke system, increased competition, increased number of carriers, discounted fares, growth in air travel, and code sharing. In an attempt to fill more seats, major carriers developed the hub and spoke system. This system has both advantages and disadvantages. While it allows airlines to charge lower fares, it also decreases direct flight routes and creates the possibility of more passenger delays due to severe weather at a hub.<sup>16</sup>

Deregulation has also provided for increased competition with the addition of many new airlines. The number of carriers certified under section 401 of the Federal Aviation Act to operate large aircraft (planes equipped to seat more than 61 passengers) grew from 36 in 1978 to 123 in 1984. Although this number has fluctuated over the last 15 years, it remains relatively high when compared to the number of carriers during the regulation era.<sup>17</sup>

The increase in carriers and overall seat availability has caused the airlines to take measures to capture more customers. Since 1978, fares have risen half as fast as the rate of inflation. In fact, the Brookings Institute estimated that deregulation saved airline travelers approximately \$5.7 billion annually. Much of this savings is a result of discounted fares, with over 90% of today's tickets purchased with a discount. Additionally, airlines instituted frequent flyer programs to achieve customer loyalty by providing incentives to regularly fly a particular airline.<sup>18</sup>

Finally, deregulation has resulted in code sharing. Code sharing is an agreement between major airlines and small, regional carriers that allows the regional airlines to share the Computerized Reservation System two-letter code that the national carriers use for identification. This permits regional carriers to display their flights as through flights, instead of connecting flights, which appear lower in the Computerized Reservation System listings, and includes the code-sharing regional carriers in the major airlines' frequent flyer programs. Code sharing also allows regional carriers to paint their planes in a similar fashion to their larger code-sharing partners, and provides for

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<sup>16</sup> *See id.*

<sup>17</sup> *See id.*

<sup>18</sup> *See id.*

easier connections between carriers with improved schedule coordination.<sup>19</sup>

### III. PROPOSALS FOR IMPROVING AIRLINE CUSTOMER SERVICE

#### A. EARLY PROPOSALS: THE AIRLINE PASSENGER BILL OF RIGHTS AND THE AIRLINE PASSENGER DEFENSE ACT OF 1990

"We need a strong consumer advocate, an independent guardian of consumer rights in air transportation: one who seeks not to humble or hamstring the airlines, but to obtain for consumers that which is his or her just due."<sup>20</sup> The first Passenger Bill of Rights was proposed to Congress on October 25, 1989. Representative Pete Stark structured this legislation to "deal with many of the aspects of airline travel that annoy, infuriate and inconvenience us."<sup>21</sup> Stark designed his proposal in response to deteriorating conditions for airline travelers.

This proposal did not become law due, in part, to opposition from the airline industry. Spokesman for the Air Transport Association,<sup>22</sup> Bill Jackman, stated that the airlines "actually feel that some of the provisions of the Stark bill could actually result in more delays."<sup>23</sup>

Representative Don Ritter proposed additional measures to protect the airline customer on August 3, 1990 with the Airline Passenger Defense Act of 1990.<sup>24</sup> In remarks before Congress, Representative Ritter described the aspects of the airline industry that led him to attempt to attain an increased level of consumer protection.

Representative Ritter cited the domination of gate space in the nation's major airports as a factor adding to the need for government intervention. "Today, the top eight airlines control more than 90 percent of the market, down from 15 airlines in 1984, and barriers to market entry are formidable. The eight

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<sup>19</sup> See *id.*

<sup>20</sup> Ritter Statement, *supra* note 7, at E2624.

<sup>21</sup> Greenberg, *supra* note 6, at 2E.

<sup>22</sup> The Air Transport Association's "members transport approximately 95% of the passenger[s] and goods transported by air on U.S. flag airlines." *Airline Passenger Bill of Rights Act of 1999: Hearing on H.R. 700 Before the House Comm. on Transp. & Infrastructure*, 106th Cong. (1999) (statement of Robert P. Warren, Senior Vice President, General Counsel & Secretary, Air Transport Association of America) [hereinafter Warren Testimony].

<sup>23</sup> Greenberg, *supra* note 6, at 2E.

<sup>24</sup> See Ritter Statement, *supra* note 7.

major airlines have a virtual lock on all gate space at four of the nation's largest airports."<sup>25</sup>

Representative Ritter also voiced concern regarding the ill effects of the hub-and-spoke system. "The airlines funnel planes into a central airport and then disperse them in spokes to dozens of cities. Where a single airline has an almost total lock on traffic and air routes, the fares are as high as 18 percent above those at all other airports."<sup>26</sup> Pointing out the disadvantages of the hub-and-spoke system, Representative Ritter noted that "more people are driving the 257 miles [from Kansas City] to St. Louis now that Braniff Airlines has gone bankrupt and no longer serves the city. A full fare, one-way coach ticket on TWA—April 1990—costs \$250. A cab fare costs \$231."<sup>27</sup>

Additionally, Representative Ritter discussed the amount of time and money wasted due to airline congestion. The Congressman pointed out that, according to the Department of Transportation, airlines bumped over 100,000 people in 1989.<sup>28</sup> Additionally, Ritter cited a Brookings Institute study, which estimated that "congestion-induced delays needlessly cost passengers and airlines \$5 billion in wasted time and extra aircraft operating costs."<sup>29</sup>

Before Representative Ritter revealed the elements of his proposal, he summed up the state of the airline industry. "Without the necessary competition for air routes, or any regulatory oversight, the results are often disastrous. Let's face it, without competition in the marketplace, the airlines aren't providing decent service."<sup>30</sup>

Representative Ritter then announced his proposed Airline Passenger Defense Act of 1990. This plan would:

- (1) Prohibit flight cancellations for reasons other than safety within 72 hours of a scheduled departure, and compensate passengers for such prohibited cancellations.
- (2) In order to allow passengers to make alternate arrangements, require airlines to notify passengers of delays that will last at least 15 minutes, the reason for the delay, and the approximate length of the delay.

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Ritter Statement, *supra* note 7.



- (3) Increase the limit of liability when airlines lose baggage from \$1250 to \$2500, and penalize the airlines that do not do so.
- (4) When baggage delivery is delayed three or more hours, require airlines to compensate passengers for the delay, and simplify the procedures for reporting and being reimbursed for lost baggage.
- (5) When a lost or damaged baggage claim is made, the airlines must resolve the claim within 30 days to avoid having to pay a penalty directly to the passenger.

In order to enforce this proposal, Ritter's plan called for the creation of a new, independent office within the Department of Transportation, the Office of Airline Passenger Advocacy, to oversee airline activity, enforce regulations, and penalize those who violate them. This Office could also publicize airline flights that are late over 70% of the time in three consecutive months.<sup>31</sup> Although Ritter's plan received significant support from various sources,<sup>32</sup> Congress elected not to vote it into law.

While both Representative Ritter's Airline Passenger Defense Act of 1990 and Representative Stark's Airline Passenger Bill of Rights were defeated, each of these propositions helped lay the groundwork for future proposals by heightening awareness of the need for improved airline customer service.

#### B. H.R. 700: THE AIRLINE PASSENGER BILL OF RIGHTS ACT OF 1999

"I essentially feel [the airlines] don't give a damn about the traveling public."<sup>33</sup> Representative Bud Shuster, the Chairman of the House Committee on Transportation and Infrastructure introduced the Airline Passenger Bill of Rights on February 10, 1999.<sup>34</sup> Shuster stated, "I hope this legislation serves as a wake-up call to the airline industry. As industry profits soar, so do the number of passenger complaints. The airlines must refocus their efforts on providing better customer service. They need to start treating their passengers like human beings."<sup>35</sup> Chairman

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<sup>31</sup> *Id.*

<sup>32</sup> *See id.* (Representative Ritter presented various letters of support to the House of Representatives, including letters from the Airline Passengers Association of North America, an organization made up of over 110,000 frequent business flyers).

<sup>33</sup> *Shuster Unveils Passenger Bill of Rights*, CONGRESS DAILY, Feb. 10, 1999.

<sup>34</sup> *See United States House of Representatives Press Release: Shuster Introduces Airline Passenger Bill of Rights*, at <http://www.house.gov/transportationpress/press88.htm> (Feb. 10, 1999) [hereinafter Shuster Announcement].

<sup>35</sup> *Id.*

Shuster pointed out the increase in the number of passenger complaints per 100,000 passengers, up 26 percent from 1997 to 1998.<sup>36</sup> Shuster also discussed the events of the Detroit New Year's Eve weekend, claiming that many passengers were "held prisoners for 12 hours" while unable to exit planes only feet from the terminal. Representative Shuster said the treatment of the passengers "struck a raw nerve."<sup>37</sup> Due in part to increasing customer dissatisfaction, Shuster introduced the Passenger Bill of Rights to "encourage better service and make the airlines more responsible to their passengers."<sup>38</sup>

### 1. *Language of House Bill 700*

Representative Shuster attached a summary of the Passenger Bill of Rights to a press release announcing the unveiling of the proposed legislation, House Bill 700:<sup>39</sup>

- Requires airlines to pay compensation to passengers if they are kept waiting *on the runway* for more than two hours either prior to takeoff or after landing. The compensation would be twice the value of the ticket and would increase proportionally as the wait lengthens. Compensation would triple at three hours, quadruple at four hours, etc. Departure delays attributable to air traffic control would not require compensation from the carrier.
- Prohibits an airline from using a single flight number to denote a flight that it knows will involve a change of aircraft. The number of passengers on the flight would multiply the penalty.
- Requires an airline to explain the reasons for a delay, cancellation, or diversion to a different airport and penalizes the airline, not the employee, if the explanation is false or misleading. . . .
- Requires airlines to refund the money of any passenger on a flight that is *cancelled for economic reasons*. Requires airlines to report all cancellations to DOT [Department of Transportation] including the flight number, departure time, and load factor of the flight cancelled. The DOT must review reports submitted and determine whether a pattern of canceling a specific flight exists or of canceling flights with low load factors (under 30 percent). If DOT finds that a flight was cancelled

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<sup>36</sup> *See id.*

<sup>37</sup> *Airlines Take Heed: Passengers Are People Too, New Legislation is Designed to Improve Service*, WORLD AIRLINE NEWS, Feb. 12, 1999.

<sup>38</sup> Shuster Announcement, *supra* note 34.

<sup>39</sup> *Id.*

for economic reasons, passengers on that flight must have their money refunded.

- Requires airlines to make a good faith effort to return lost property to the owner if the person's name is on the property.
- Prohibits security screeners from separating babies from their parents.
- In cases where airlines share their two-letter designator code on a flight (*code sharing*), requires airlines to notify passengers if they will not actually be flying on the airline whose code is being used.
- Directs airlines not to prohibit or charge an additional fee to passengers who only use a portion of their ticket. This is designed to permit "hidden city" ticketing (where the passenger buys a ticket for a more distant point but gets off the plane at the first stop because the ticket to the more distant point was cheaper) and "back-to-back" ticketing (where the passenger buys two round trip tickets but uses only half of each because doing so takes advantage of the cheaper tickets one can get by staying over a Saturday night[.]).
- Require airlines to reveal, upon request, the number or percentage of seats that are available for use by those redeeming *frequent flyer* awards.
- Directs DOT to study and report to Congress on whether airlines are providing adequate supervision of *unaccompanied minors* on their flights.<sup>40</sup>

Congressman Dingell introduced a similar bill, the Passenger Entitlement and Competition Enhancement Act, House Bill 780.<sup>41</sup> There are several slight differences between House Bill 780 and House Bill 700.

- H.R. 780 would require all airlines to have an emergency plan on record with the Department of Transportation to ensure that, in the event of an emergency, all boarded passengers would have access to such necessary services as food, water, emergency medical services, and restroom facilities. . . . [F]ailure to have such a plan on file would result in the suspension of the carrier's license. Also, violations of the emergency plan would yield \$10,000 fines.
- H.R. 780 would also alter carrier liability by doubling it from the current \$1,250 for mishandled baggage[,] to \$2,500 for provable damages that the passenger incurred because of the carrier's improper handling.

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<sup>40</sup> *Id.*

<sup>41</sup> See *Hearing on Aviation Passengers Protection, H.R. 700, H.R. 780, & H.R. 908 Before the House Comm. on Transp. & Infrastructure, 106th Cong. (1999)* [hereinafter *House Background Information*].

- In addition, H.R. 780 would specify that should a passenger be involuntarily denied boarding, the air carrier would not be absolved of its responsibility to carry any such passenger to the passenger's final destination. Further, if the scheduled arrival time of the alternate transportation is not within two hours of the originally scheduled arrival time, then the airline must also provide affected passengers with a voucher or refund equal in value to the original price paid by the passenger for the original flight.<sup>42</sup>

## 2. *Testimony*

The House Committee on Transportation and Infrastructure's Subcommittee on Aviation (the "Subcommittee") held a hearing "to discuss the treatment of aviation users and specifically the Airline Passenger Bill of Rights Act of 1999."<sup>43</sup> The hearing provided the opportunity for those involved in the airline industry to voice their positions concerning the newly proposed legislation. The hearing featured the testimony of individuals from Northwest Airlines,<sup>44</sup> the United States Chamber of Commerce,<sup>45</sup> the Air Transport Association of America,<sup>46</sup> the National Air Carrier Association,<sup>47</sup> and the American Society of Travel Agents.<sup>48</sup>

Prior to the commencement of testimony, the Subcommittee provided background information regarding the purpose of the legislation. The background information contains many factors, all leading to the conclusion that airline passengers are growing more and more dissatisfied with the level of customer service

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See *Hearing on Aviation Passengers Protection, H.R. 700, H.R. 780, & H.R. 908 Before the House Comm. on Transp. & Infrastructure*, 106th Cong. (1999) (statement of Richard B. Hirst, Senior Vice President for Corporate Affairs, Northwest Airlines, Inc.) [hereinafter Hirst Testimony]. See also *Hearing on Aviation Passengers Protection, H.R. 700, H.R. 780, & H.R. 908 Before the House Comm. on Transp. & Infrastructure*, 106th Cong. (1999) (statement of Capt. Joseph E. Gilroy of Northwest Airlines, Inc.).

<sup>45</sup> See *Hearing on Aviation Passengers Protection, H.R. 700, H.R. 780, & H.R. 908 Before the House Comm. on Transp. & Infrastructure*, 106th Cong. (1999) (statement of Andrew H. Card, Fellow for Public Policy for the U.S. Chamber of Commerce).

<sup>46</sup> See Warren Testimony, *supra* note 22.

<sup>47</sup> See *Hearing on Aviation Passengers Protection, H.R. 700, H.R. 780, & H.R. 908 Before the House Comm. on Transp. & Infrastructure*, 106th Cong. (1999) (statement of Edward J. Driscoll, President and Chief Executive Officer, National Air Carrier Association) [hereinafter Driscoll Testimony].

<sup>48</sup> See Ruden Testimony, *supra* note 9.

that they receive.<sup>49</sup> There are several facts of particular interest cited in the background information:

A University of Michigan Survey found that, of a list of thirty-three U.S. institutions, only the Internal Revenue Service got worse consumer satisfaction ratings than the airline industry.<sup>50</sup>

A United States Department of Transportation study discovered that passenger complaints per 100,000 passenger boardings rose twenty-six percent between 1997 and 1998.<sup>51</sup>

The Air Transport Association (ATA), an industry group representing the major air carriers, periodically surveys the public on their opinion of the airline industry. According to a recent survey, the public gives airlines a seventy-eight percent favorable rating, compared with a favorable rating in the low sixties for the auto industry.

The Committee's background information also alluded to the New Year's Eve weekend events in Detroit, pointing out that several passengers are pursuing a class-action suit partially based on false imprisonment.<sup>52</sup>

After providing background information, the Committee heard statements and testimony.

a. Statement of Richard B. Hirst, Senior Vice President for Corporate Affairs, Northwest Airlines, Inc.

Richard B. Hirst, Northwest Airlines' Senior Vice President for Corporate Affairs proclaimed that, "[w]hile well-intentioned, we believe that this legislation will produce unintended and highly undesirable consequences including raising air fares and creating economic penalties for decisions that may be fully consistent with our primary duty to protect the safety of our passengers and employees."<sup>53</sup> Hirst's statement offered some broad predictions, and then addressed the Passenger Bill of Rights in a point-by-point analysis.

Broadly, Hirst addressed several issues. Likely referring to the Detroit New Year's Eve weekend, Hirst stressed that Northwest's primary concern is with passenger safety.<sup>54</sup> Hirst also went on to apologize, once again, for the "hardship we caused our passen-

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<sup>49</sup> See House Background Information, *supra* note 41.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See *id.*

<sup>53</sup> Hirst Testimony, *supra* note 44.

<sup>54</sup> See *id.*

gers who could not safely disembark their aircraft in a timely manner" during the Detroit weekend.<sup>55</sup> Additionally, Hirst voiced Northwest's opinion that delays are due, in large part, to the inadequacy of the outdated air traffic control system.<sup>56</sup>

After going into greater detail regarding these concerns, Hirst then addressed the Passenger Bill of Rights, issue by issue.

Hirst claimed that the provision in House Bill 700 that fines airlines for excessive delays creates a safety hazard. "The legislation would imprudently inject the element of government-imposed fines into the decision making process when airlines consider whether it is safe to dispatch or receive aircraft."<sup>57</sup> While Hirst maintained that Northwest would not stray from its primary concern for customer safety, even under the threat of fines, he stated that Northwest believes "it is unwise for Congress to even make economic penalties an element that could be weighed by some airlines in making such decisions."<sup>58</sup> In support of Northwest's claim that such fines are bad policy, Hirst referred to factors that are beyond airlines' control.<sup>59</sup> Because, claimed Hirst, most delays are caused by uncontrollable factors, such as air traffic control delays and weather, the provision is unnecessary.<sup>60</sup>

Hirst then addressed the issue of unaccompanied minors. Hirst stressed the fact that "Northwest has made considerable investments in our unaccompanied minors program and we believe that our program is the best in the industry."<sup>61</sup> This claim, along with supporting data provided by Hirst, leads to the inference that Northwest believes that no government regulation is needed regarding unaccompanied minors.<sup>62</sup>

The Northwest Vice President went on to discuss the ramifications of allowing airline passengers to use segments of a ticket without penalty, also known as hidden-city ticketing.<sup>63</sup> If the carrier could not prohibit a passenger from taking advantage of those connect market discounts for his non-stop market itinerary, the carriers would confront the choice of either limiting or

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<sup>55</sup> *Id.*

<sup>56</sup> *See id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *See* Hirst Testimony, *supra* note 44.

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

discontinuing discounts in the connect markets or suffering the effect of a de facto reduction of its non-stop fares in virtually all the non-stop markets to and from the intervening hub.<sup>64</sup>

Hirst stated that, because the airline industry sets prices according to supply and demand rather than air mileage, this provision of the Passenger Bill of Rights "will dampen competition rather than enhance it."<sup>65</sup> The Vice President of Northwest pointed out that the nature of a deregulated market creates low margins for the airlines.

Hirst maintained that ticket price savings in hub markets will be "dwarfed" by increased fares in connecting markets. This, Hirst claimed, is because hub fares will not be lowered, but ticket prices in connecting markets will rise, as it is "unrealistic" to believe that, under the proposed regulation, airlines will continue to allow passengers to share in the savings of the hub-and-spoke system.<sup>66</sup>

Hirst then classified the provision of the Passenger Bill of Rights requiring publication of the number of frequent flyer seats on each flight as a "government-imposed ceiling on the number of frequent-flyer seats."<sup>67</sup> According to Hirst, this ceiling will result because "such estimates will be conservative to give carriers flexibility to hold-out more seats for sale."<sup>68</sup> Hirst asserted that while the proposed legislation will have an adverse effect on passengers, passengers do not need to know this information, as "carriers already disclose a wealth of information about their frequent flyer programs" to passengers.<sup>69</sup>

Hirst concluded his statement with a discussion of four final elements of the Passenger Bill of Rights that Northwest feels are unnecessary: the provisions in the Bill relating to economic cancellations, the truth telling provision, the baggage return provision, and the code sharing disclosure provision.<sup>70</sup> Hirst declared that "Northwest does not cancel any flights for 'economic' reasons."<sup>71</sup> According to Hirst, the damage done by an economic cancellation would do more damage to Northwest's business than the savings that would result from the cancella-

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<sup>64</sup> See Hirst Testimony, *supra* note 44.

<sup>65</sup> *Id.*

<sup>66</sup> See *id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See Hirst Testimony, *supra* note 44.

<sup>71</sup> *Id.*

tion.<sup>72</sup> Additionally, by monitoring possible economic cancellations, the government would both incur unnecessary expenses and potentially “inconvenience passengers if airlines begin making unwise decisions on what flights to cancel in their network system due to concern that DOT may second-guess such decisions.”<sup>73</sup>

Similarly, Northwest believes the Passenger Bill of Rights' truth telling provision is unnecessary because Northwest policy already mandates that, while Northwest employees “may not have complete information at all times, they are trained to convey the best information possible at all times.”<sup>74</sup> Hirst also pointed out that current Northwest policies regarding returning baggage and revealing code-sharing practices already conform with the proposed legislation, and that DOT regulations currently require airlines to provide code-sharing information to their passengers.<sup>75</sup> Thus, said Hirst, these provisions are superfluous.<sup>76</sup>

b. Statement of Robert P. Warren, Senior Vice President,  
General Counsel & Secretary, Air Transport  
Association of America

Robert P. Warren, Senior Vice President, General Counsel and Secretary of the Air Transportation Association of America (ATA), spoke out against the Passenger Bill of Rights.<sup>77</sup> Warren, speaking on behalf of the ATA, whose members transport approximately 95% of passengers and goods carried by U.S. flag airlines, offered the “Commitment to Customer Service,” a plan instituted by the airlines, as a solution to improve the state of the airline industry.<sup>78</sup> He stated that the airlines that make up the ATA “all share the same objective of providing the highest quality service to our passengers.”<sup>79</sup>

Warren discussed the faults with the proposed Passenger Bill of Rights. According to Warren, precluding U.S. carriers from using a single flight number, even if different aircraft are used between flight segments, will create a “competitive disadvan-

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<sup>72</sup> See *id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See Warren Testimony, *supra* note 22.

<sup>78</sup> See *id.*

<sup>79</sup> *Id.*



tage" for U.S. carriers compared to foreign carriers in limited entry markets.<sup>80</sup> Under the multiple flight number requirement, the disadvantage will arise due to a lack of slots available at foreign airports. Additionally, Warren stated that the requirement is unnecessary as passengers are already privy to the aircraft change as "computer reservation screens and ticket itineraries already disclose the necessity to change aircraft."<sup>81</sup>

Warren also claimed that it is wrong to subject airlines to civil penalties for erroneous announcements regarding the reasons for flight delays, cancellations, or diversions. Penalties are inappropriate, according to Warren, as airline employees can only report the best information that is available to them at the time, and this information is often incomplete.

[A] delay, cancellation, or diversion may be occasioned by a complex series of events or a combination of factors. Thus a diversion to a secondary airport for refueling may be a result of an air traffic control slowdown due to weather. Should a pilot's quick description reference only one of these reasons in reporting to passengers subject an air carrier to a substantial fine? Do we want air crews subjected to concern over the threat of a Department of Transportation investigation of precisely what was reported to passengers?<sup>82</sup>

Warren also claimed that it is inappropriate to penalize airlines for delays in excess of two hours. "This provision raises a conflict between the Department of Transportation's delay statistics, FAA air traffic control queuing procedures, and safety considerations."<sup>83</sup> The ATA spokesman stated that by initiating such a provision, in situations where inclement weather arises after an aircraft departs the gate, the only way that these planes can meet the proposed Bill's requirements is to return to the gate within two hours and cancel the flight. Thus, both passengers and airlines would suffer as a result.<sup>84</sup> Additionally, Warren claimed that the provision might create a safety risk for passengers. "Should a pilot speed up or forego a de-icing while in the departure queue in order to avoid the financial penalties?"<sup>85</sup>

The ATA also opposes allowing passengers to use only a portion of a ticket regardless of the reason for not using other por-

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Warren Testimony, *supra* note 22.

<sup>84</sup> *See id.*

<sup>85</sup> *Id.*

tions.<sup>86</sup> According to Warren, “[t]he bill would thus reinstate government regulation of airline prices by making it unlawful for airlines to charge lower per mile fares in long haul markets than they charge on a per mile basis in shorter haul markets.”<sup>87</sup> On behalf of the ATA, Warren explained that by preventing “hidden city ticketing,”<sup>88</sup> the proposed bill is fighting the law of supply and demand, which currently dictates fare rates.

As a solution to the state of the airline industry, Warren and the ATA voiced support for the airline-sponsored “Commitment to Customer Service.” This plan offers many of the features of the proposed Passenger Bill of Rights.

We are recommitted to providing timely and accurate information concerning flight delays and cancellations. Airlines will reaffirm that passengers should expect to be accommodated on flights for which they have a confirmed reservation, a valid ticket and have adhered to airline policies.

Airlines will quote passengers the lowest fares available for which they qualify. Airlines who transport unaccompanied minors will have appropriate supervision available. Airlines are committed to providing passengers with information on the privileges and redemption requirements of a carrier’s frequent flyer program. And the airlines reaffirm their commitment to ensuring that passengers receive their luggage in a timely manner and that they provide their customers with prompt information concerning lost or misrouted baggage insofar as such information is available.<sup>89</sup>

In his statement, Warren stressed that, while there will constantly be conditions beyond the airlines’ control, the airlines are committed to providing the best possible passenger service, and constantly improving in order to do so. Warren pointed out that, despite weather problems and complications due to outdated air traffic control systems, out of the 611 million passengers carried in 1998, only one of every 100,000 passengers registered a complaint with the Department of Transportation.<sup>90</sup>

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<sup>86</sup> *See id.*

<sup>87</sup> *Id.*

<sup>88</sup> “The practice of a passenger purchasing a ticket to a destination beyond his intended destination that is priced lower than his intended intermediate destination and simply throwing away the coupon for the unused segment.” *Id.*

<sup>89</sup> Warren Testimony, *supra* note 22.

<sup>90</sup> *See id.*

[W]e cannot completely cancel the limitations of severe weather, the air traffic control system, and the limitation of airport facilities, machines, and people. We do as well as we do, however, by never being satisfied, by always looking for improvement. We are under enormous market pressures to eliminate every delay, every inconvenience, and every instance of poor service or unsatisfactory information. We do these things because, as businesses, it is in our best interest to do everything we can to please the public.<sup>91</sup>

c. Statement of Edward J. Driscoll, President and Chief Executive Officer, National Air Carrier Association

Edward Driscoll, President and Chief Executive Officer of the National Air Carrier Association,<sup>92</sup> issued a statement to the House of Representatives Subcommittee on Aviation in opposition to the proposed Passenger Bill of Rights. Before discussing specific provisions of the proposed bill, Driscoll voiced the National Air Carrier Association's view that the bill should not apply to charter carriers, as these flights are already regulated by 14 C.F.R. §§ 208, 212, & 380, nor should it apply to international services "as that would create an unlevel playing field since foreign carriers will not be subject to this legislation."<sup>93</sup>

According to Driscoll, "[t]he proposal in *our judgment is tantamount to re-regulation of the air carrier industry.*"<sup>94</sup> (emphasis in original) This effective re-regulation arises as the proposal replaces air carriers' control over customer service with governmental regulation.<sup>95</sup> Driscoll described the proposal as "over-reaching to try to correct a situation that the Secretary of Transportation has the necessary authority to address without the need for additional legislation."<sup>96</sup> Additionally, Driscoll stated that the National Air Carrier Association's members "are required to provide low-cost systems at the highest degree of efficiency in order to produce a reasonably profitable operation.

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<sup>91</sup> *Id.*

<sup>92</sup> The National Air Carrier Association is made up of "small national carriers who provide low-cost, scheduled and charter service for passengers as well as shippers both domestically and internationally. They also provide service to the military and are members of the Civil Reserve Air Fleet program and operate for the military during peacetime as well as emergencies." Driscoll Testimony, *supra* note 47.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *See id.*

<sup>96</sup> *Id.*

They cannot afford to have aircraft on the ground for an excessive period of time other than that which is caused by air traffic or weather conditions.”<sup>97</sup>

Driscoll concluded by emphasizing why the NACA believes its carriers should be excluded from the legislation.

All of the NACA carriers are *small* national carriers, do not have hub and spoke systems, have limited frequent flyer programs or none at all, and each generates less than one billion dollars a year in revenue. Further, they have to operate in a most efficient manner providing low fare services and, therefore, if they fail to provide the services in an efficient manner, they won't have any traffic. Therefore, we believe that the national carriers should be exempt from this legislation because what is being proposed would appear to us to apply only to the *large* national carriers.<sup>98</sup>

d. Testimony of the American Society of Travel Agents, Inc.

Paul M. Ruden, acting Chief Operating Officer of the American Society of Travel Agents [ASTA]<sup>99</sup> appeared before the House Transportation and Infrastructure Subcommittee on Aviation in support of the proposed Passenger Bill of Rights.<sup>100</sup> In discussing the ASTA's backing of the proposed Bill of Rights, Ruden highlighted the ASTA's 1998 proposal, the nine-point Air Travelers' Bill of Rights, which gives passengers the right to:

- Truth in advertised prices, schedules and seat availability
- Equal access to unbiased, comparative travel information and all fare and service options
- A comfortable seat, reasonable space for carry-on luggage, healthful meals, and clean sanitary facilities, regardless of class of service
- Timely and courteous assistance in making connections
- Use all, part or none of the segments on any ticket purchased
- Timely, complete and truthful information and courteous assistance regarding delays, cancellations, and equipment changes
- Timely and courteous assistance for the disabled and unaccompanied children

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> The American Society of Travel Agents members make up more than half of the 29,000 travel agency locations in the United States. The Society's main functions are to represent the interests of travel agents to all levels of government, to set ethical standards for travel agents, and to provide consumer protection for the public. Ruden Testimony, *supra* note 9.

<sup>100</sup> *See id.*

- Appropriate in-flight medical emergency assistance
- Access to the courts and state consumer laws to resolve disputes with airlines.<sup>101</sup>

Ruden's testimony stated that when the ASTA invited the airlines to adopt this policy, the airlines rejected the proposal, claiming "that the Air Travelers' Bill of Rights was just sour grapes by travel agents who were miffed over airline reduction of [travel agent's] commissions."<sup>102</sup>

The ASTA believes that "[t]he forces of competition are not disciplining the airlines' behavior in the way that was anticipated when the Airline Deregulation Act was passed in 1978."<sup>103</sup> Deregulation can only effectively continue "in the presence of effective competition as the protector of consumers."<sup>104</sup> According to Ruden, airlines, as a group, have deliberately reduced competition, and thus harmed the air traveler. Among the competition-reducing activities of the airline industry are non-compensatory commission policies, agency transactions originating on the Internet, and new entrant obstacles. This reduction in competition demands new government-imposed standards for airlines' treatment of consumers, i.e., the passage of the proposed Bill of Rights.<sup>105</sup>

Additionally, the ASTA feels that the airlines are currently taking advantage of a portion of the Airline Deregulation Act of 1978 designed to prevent the states from regulating the airlines, which would effectively negate the purpose of the Deregulation Act.<sup>106</sup> The Deregulation Act

prohibited states from 'enact[ing] or enforc[ing] any law . . . relating to rates, routes, or services.' . . . That federal preemption provision, shielding airlines from state regulation, has now been turned by the airlines into a sword with which they bar the general public and small businesses from holding them accountable under the same state law that applies to every other industry in the country.<sup>107</sup>

This allows airlines to claim immunity from the requirements of state laws, while at the same time holding others accountable

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *See id.* (quoting Alfred Kahn, "the acknowledged 'father' of airline deregulation").

<sup>105</sup> *See* Ruden Testimony, *supra* note 9.

<sup>106</sup> *See id.*

<sup>107</sup> *Id.* (quoting 49 U.S.C. § 1305(a)(1)).

under the same laws. For example, in *Smith v. Comair, Inc.*,<sup>108</sup> the U.S. Court of Appeals for the Fourth Circuit held that a passenger's suit against an airline was barred by the preemption provision in the Deregulation Act even though the passenger was treated rudely and unprofessionally in not being allowed to board his flight.<sup>109</sup> Thus, the ASTA believes that the proposed Passenger Bill of Rights takes an appropriate step toward the government regaining some control over the airline industry as it

strikes the appropriate balance between the airlines' need to be free of state economic regulation of fares and routes in a deregulated environment, and [sic] the rights of consumers and others to have redress against airlines for their failures to abide by the same state law standards of conduct all other parties must observe.<sup>110</sup>

### C. SENATE BILL 383: AIRLINE PASSENGER FAIRNESS ACT

The Senate's proposal to protect airline passengers was designed to "make airlines subject to courtesies already offered by 'the local movie house and your corner grocery store.'"<sup>111</sup> Senator John McCain, Chairman of the Senate Commerce Committee, unveiled the Senate's version of the Airline Passengers' Bill of Rights, the Airline Passenger Fairness Act, on February 7, 1999. This proposal is similar to the proposed Passengers' Bill of Rights, designed to equalize the current imbalance of power between the airline industry and the traveling consumer, and more specifically "[t]o establish a national policy of basic consumer fair treatment for airline passengers."<sup>112</sup>

In order to lay a foundation for the proposal of the Airline Passenger Fairness Act, the Senate Committee on Commerce, Science, and Transportation made several findings. Among these findings are that: (1) the number of airline passengers on the United States air carriers is expected to grow over 66 percent to about one billion by 2008, (2) since the Deregulation Act of 1978 "6 of the United States' largest air carriers sought to enter into arrangements that would result in 3 large networks comprising approximately 70 percent of the domestic market,"

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<sup>108</sup> 134 F.3d 254 (4th Cir. 1998).

<sup>109</sup> See Ruden Testimony, *supra* note 9.

<sup>110</sup> *Id.*

<sup>111</sup> *Senator Unveils a Bill for Passengers' Rights*, SEATTLE POST-INTELLIGENCER, Feb. 8, 1999, at D2.

<sup>112</sup> See S. 383, 106th Cong. (1999).

(3) there is a marked decrease in the number of markets served by scheduled air service as compared to 1978 (a 1/3 decrease), (4) there is a combination of decreased traffic (down 20%) and an average 30% fare increase year-over-year (as reported in the Department of Transportation's Domestic Air Fares Consumer Report for the 3rd quarter of 1997 in 75 major city pairs), (5) United States air carriers charge roughly twice as much for air fares in large hub airports where there is no low fare competition as they do in a hub airport where low fare competition is present (as reported in a 1998 Department of Transportation study), (6) complaints filed with the Department of Transportation regarding airline travel increased more than 25% between 1997 and 1998, flight delays of fifteen minutes or longer increased by "nearly 20%" between 1995 and 1996 (as reported by the National Civil Aviation Review Commission in 1997), and (7) United States airlines charge approximately "60% more to passengers traveling to or from small communities than they charge to passengers traveling between large communities" (as reported in a 1998 Department of Transportation study).<sup>113</sup>

### 1. *Language of Senate Bill 383*

The proposed Airline Passenger Fairness Act was intended "[t]o establish a national policy of basic consumer fair treatment for airline passengers."<sup>114</sup> The proposal, Senate Bill 383, lists that unfair or deceptive practices and unfair methods of competition include, in the case of a certified air carrier, an air carrier's failure:

- to inform a ticketed passenger, upon request, whether the flight on which the passenger is ticketed is oversold;
- to permit a passenger holding a conformed reserved space on a flight to use portions of that passenger's ticket for travel, rather than the entire ticket, regardless of the reason any other portion of the ticket is not used;
- to deliver a passenger's checked baggage within 24 hours after arrival of the flight on which the passenger traveled and on which the passenger checked the baggage, except for reasonable delays in the delivery of such baggage;
- to provide a consumer full access to all fares for that air carrier, regardless of the technology the consumer uses to access the fares if such information is requested by that consumer;

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

- to provide notice to each passenger holding a confirmed reserved space on a flight with reasonable prior notice when a scheduled flight will be delayed for any reason (other than reasons of national security);
- to inform passengers accurately and truthfully of the reason for the delay, cancellation, or diversion of a flight;
- to refund the full purchase price of an unused ticket if the passenger requests a refund within 48 hours after the ticket is purchased; and
- to disclose to consumers information that would enable them to make informed decisions about the comparative value of frequent flyer programs among airlines, including the number of seats redeemable on each flight and the percentage of successful and failed redemptions on each airline and on each flight.<sup>115</sup>

This proposal spurred the airlines to adopt a voluntary plan for customers to service themselves to avoid the increasing threat of government intervention. This plan, the Airline Customer Service Commitment plan, offered by the Air Transport Association, however, did not officially arise until after the Senate held hearings discussing their newly proposed Senate Bill 383.<sup>116</sup>

## 2. *Testimony*

On March 11, 1999, the Senate Committee on Commerce, Science, and Transportation heard testimony from several individuals, some speaking on behalf of organizations, regarding the proposed Airline Passenger Fairness Act. Several parties offered support for the proposed Air Passenger Fairness Act, while others spoke out against Senate Bill 383.

### a. Statement of Senator John McCain, Chairman Senate Committee on Commerce, Science, and Transportation

Prior to receiving testimony Senator John McCain, Committee Chairman, offered a statement regarding the purpose of the proposed Airline Passenger Fairness Act.<sup>117</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> See Press Release, United States Senate Committee on Commerce, Science, and Transportation, *Committee Approves Airline Passengers Bill*, at <http://www.senate.gov/~commerce/issues/106-84.htm> (June 23, 1999).

<sup>117</sup> *Airline Passenger Fairness Act: Hearing on S. 383 Before the Senate Comm. on Commerce, Science, and Transp.*, 106th Cong. (1999) (statement of Sen. John McCain, Chairman, Senate Committee on Commerce, Science, & Transp.).



We're not talking about guarantees of French wines and blockbuster movies in coach. We're talking about the expectation that you will be told the truth about why your flight was canceled. Or the expectation that you can find out from an airline whether or not you are getting its lowest fare that's available to you.<sup>118</sup>

McCain pointed out that Senate Bill 383 is necessary because of the lack of a "truly competitive market without barriers to entry."<sup>119</sup> The Chairman offered the query, "I do not understand . . . how simply telling a passenger whether a flight is overbooked would increase costs. How does telling the truth about delays increase costs?"<sup>120</sup> "The Airline Passenger Fairness Act simply specifies that airlines that deny their passengers certain fair treatment risk violating this prohibition."<sup>121</sup>

b. Testimony of Jeannie Johanningmeier: Northwest Airlines Passenger During the Detroit New Year's Weekend Blizzard

Jeannie Johanningmeier, a passenger on Northwest Airlines during the New Year's weekend snowstorms in Detroit, offered an extreme example of the offensive treatment some passengers received from one of the United States' major air carriers, Northwest Airlines. Ms. Johanningmeier described the events as she, along with dozens of other passengers, were stranded on a runway in excess of nine hours.

We would go hours without hearing a word from the crew. Every now and then the pilot would tell us he didn't know what was happening and that he was just as upset as we were.

I felt like we were prisoners that there was nothing we could do, and that we were at the mercy of the airline. We wondered why they couldn't bring buses out to get us or at least bring us food and water.

As the night wore on, snow continued to pile up outside while the air inside became increasingly stale. Soon the cabin filled with what seemed like exhaust fumes. Some people began to worry for their safety. We had been trapped five, six, seven hours when it began to feel like the plane was closing in on me. I had to stand in the middle of the aisle to stretch. We took the boys on walks up and down the plane to try to keep them entertained. We played games with them, colored with them and tried to keep

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

them calm. At times, I felt like crying or screaming, but [I] knew that would only make matters worse.

When we finally pulled into the gate at 12:30 A.M., the pilot told us the airport would be closed until 4:00 the next day, and that we were booked on the first flight. . . . First, the Northwest staff would say flights were on time, then delayed, then cancelled. This happened over and over. [Mr. Johanningmeier] finally learned that we really weren't booked for the first flight out – as the pilot had said.<sup>122</sup>

c. Testimony of Darlene McCord: United Airlines Passenger

Another air traveler, Darlene McCord, spoke about the poor service she received on a trip to the Cayman Islands aboard United Airlines.<sup>123</sup> Ms. McCord described in detail how “United Airlines totally abandoned us.”<sup>124</sup> McCord’s testimony outlined how she and her husband experienced multiple delays, including one in which, “United said that our second plane was being delayed for three broken seats. Once we boarded, the seats were just taped off. No reason for the additional delay.”<sup>125</sup> The McCords attempted to make the connection to the Cayman Islands flight after this delay and, after running through the airport and arriving at the gate eight minutes prior to departure, they were refused entry to the plane.<sup>126</sup> After several days of delay and being stranded in Miami, the McCords arranged for a flight themselves to the Islands, as United Airlines offered no help in attaining tickets. Although United promised the McCords that their luggage would be waiting for them in the Caymans, when they arrived the luggage was nowhere to be found. Their visit to the Islands cut to two days, the McCords boarded a plane to get home based on United’s promise that American Airlines would honor their tickets booked through United via an electronic endorsement. The electronic endorsement was not provided, and the McCords were forced to pay the highest fare offered by American Airlines to leave the Cayman Islands.<sup>127</sup> When Ms. McCord attempted to get a copy of her re-

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<sup>122</sup> Johanningmeier Statement, *supra* note 2.

<sup>123</sup> See *Airline Passenger Fairness Act: Hearing on S. 383 Before the Senate Comm. on Commerce, Science, Transp.*, 106th Cong. (1999) (statement of Darlene McCord, United Airlines passenger) [hereinafter McCord Statement].

<sup>124</sup> See *id.*

<sup>125</sup> *Id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

cord, "I was told to get an attorney if I wanted the records because they would not be released without a subpoena."<sup>128</sup> Finally, Ms. McCord was unable to recover her lost luggage, which she valued at \$10,000. United has offered to pay only \$1,200.<sup>129</sup>

The situations described by Ms. Johanningmeier and Ms. McCord present the subterranean level to which airline customer service occasionally sinks. The women appeared in front of the committee to voice the concern that there is realistically "no place that passengers can go to get help when they are abandoned by the airlines . . . the airlines have no regard for passengers and they obviously will not improve unless forced to."<sup>130</sup>

d. Statement of Nancy E. McFadden, General Counsel,  
United States Department of Transportation

Nancy McFadden, the General Counsel to the United States Department of Transportation [DOT] offered a statement to the Senate Committee in support of the proposed Airline Passenger Fairness Act.<sup>131</sup> Throughout her statement, McFadden stressed the DOT's belief that "more can and should be done by government and, more importantly, by the airlines."<sup>132</sup> While acknowledging that perfect competition may not be possible, McFadden emphasized that "true competition is the best protection consumers can be offered."<sup>133</sup>

In her statement to the Committee, the DOT General Counsel discussed some positive aspects of the airline industry.<sup>134</sup> McFadden complimented the industry on the marked decrease in the number of fatal U.S. commercial accidents and the availability of lower fares to leisure air travelers, noting that Congress "must . . . remain aware of these important attributes of industry performance, which consumers demand and have come to expect, and take care not to disrupt them."<sup>135</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> See McCord Statement, *supra* note 123.

<sup>130</sup> *Id.*

<sup>131</sup> See *Airline Passenger Fairness Act: Hearing on S. 383 Before the Senate Comm. on Commerce, Science, and Transp.*, 106th Cong. (1999) (statement of Nancy E. McFadden, General Counsel, U.S. Dept. of Transp.) [hereinafter McFadden Statement].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> See *id.*

<sup>135</sup> *Id.*

McFadden, however, also highlighted several negative trends in the airline industry that the DOT uncovered through the examination of customer complaints, beginning in the mid-1990's. The clearest trend the DOT noted is the rise in passenger complaints logged with the Department. The most notable increases in customer complaints are in the areas of flight problems, including cancelled and delayed flights, and complaints about passengers receiving poor customer service.<sup>136</sup>

In the past two years, the category of "customer service" complaints to the DOT has increased 68%. The largest sub-categories of customer service complaints were "poor attitude;" information problems; seat assignment problems; and refusal to provide assistance. The number of complaints regarding "flight problems" increased 40% during the past two years. The largest sub-categories of flight problem complaints were cancelled and delayed flights; flight irregularities; and missed connections.<sup>137</sup>

In discussing the increase in complaints, McFadden pointed out that while the DOT received approximately 9,600 complaints in 1998, "major U.S. air carriers receive between 100 and 400 complaints for every complaint filed against them with the Department."<sup>138</sup>

McFadden proceeded to discuss two other proposals, one introduced by the Federal Aviation Administration, the Airline Passenger Fair Treatment Initiative, and one composed by the Department of Transportation itself, designed to improve the customer service provided by U.S. airlines.<sup>139</sup> The DOT feels that these proposals, when combined with the House of Representative's proposed Airline Passenger's Bill of Rights (House Bill 700) and the Senate's Proposed Airline Passenger Fairness Act (Senate Bill 383), will help "bring about meaningful improvements for airline consumers."<sup>140</sup> In describing the FAA's Airline Passenger Fair Treatment Initiative, McFadden stressed the four primary motives behind the proposal: "[f]air treatment for airline passengers, [f]ull disclosure of essential information, [r]eal compensation for unfair treatment, [and] [i]mplementing the initiative."<sup>141</sup>

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<sup>136</sup> *See id.*

<sup>137</sup> McFadden Statement, *supra* note 131.

<sup>138</sup> *Id.*

<sup>139</sup> *See id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

The DOT based their proposal on two models used by the Department in the past to solve other passenger problems: the family assistance plan approach and an approach requiring major U.S. carriers to systematically report on time performance to the DOT.<sup>142</sup>

Our second model is the great turnabout in carrier performance that followed the filing of monthly comparative data on carrier on-time performance. Prior to the filings, there tended to be great exaggeration about end-to-end flight times and the times of departure, for obvious competitive reasons, but the requirement to publicize the results—in many cases very poor results—operated very effectively to end the exaggerations that so badly misled consumers.<sup>143</sup>

The DOT's current proposal requires U.S. carriers that operate large aircraft or engage in code-sharing to "submit a consumer protection plan to the Department of Transportation as a condition of maintaining its certificate to operate."<sup>144</sup> These plans each must also meet several specific requirements:

[They must] contain a detailed summary of the customer services and related information a passenger should receive from the airline in the event of an irregularity, and the procedures the airline has in place to handle various kinds of consumer problems. For certain elements, [the DOT] proposal sets forth specific requirements air carriers must meet in developing a comprehensive customer service plan.<sup>145</sup>

Under the proposal, if an airline does not comply with each element of plans submitted to the DOT, the airline would be held in violation and subject to civil penalties.<sup>146</sup>

McFadden's statement then explained how the DOT proposal would help eliminate the problems with airlines that have been reported to the Department. First, the DOT's plan would help alleviate delays, cancellations, and diversions by requiring carriers to provide the DOT with a detailed report of written complaints on a monthly basis. The DOT will compile the results of these reports and publish them, possibly on the Internet, to improve awareness of carriers' on time records among consumers.<sup>147</sup> Additionally, the proposal requires that there be a

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<sup>142</sup> See *id.*

<sup>143</sup> McFadden Statement, *supra* note 131.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

“dispositive resolution of the complaint” within 60 days, with the DOT posting the results of whether carriers’ meet this 60-day deadline.<sup>148</sup>

The DOT’s proposal creates requirements for providing information regarding delays. Procedures used to inform passengers about delays “(1) prior to 2 [hours] before flight; (2) during the last 2 [hours] at the gate, with assurance of notice before boarding of expected delays; (3) after enplanement; (4) in-flight; and (5) after landing” must be specified in the plan each carrier must submit to the DOT under the proposal.<sup>149</sup> It is the DOT’s position that these requirements will make passengers “aware that they are entitled to regular updates with accurate information.”<sup>150</sup> Finally, to deal with delay situations such as the events during the Detroit New Year’s Eve Weekend, the DOT proposal adopts an element of House Bill 780, which creates requirements for airlines who “are held in extensive ground holds.”<sup>151</sup> Included in this portion of the proposal are that carriers in this situation must, at a minimum, provide passengers with food, water, restrooms, access to medical treatment, and heating and air conditioning during lengthy ground holds.<sup>152</sup>

The DOT further believes that its proposal will help alleviate some of the problems currently associated with denied boardings, cancellations and ticket issuance. In order to directly compensate passengers who are denied boarding on oversold flights when carriers are unable to induce voluntary bumps, the DOT proposal contains a doubling of denied boarding compensation, raising it from \$200 to \$400, or from \$400 to \$800, depending on the length of the delay.<sup>153</sup> The DOT designed this increase in passenger compensation to function as a “kind of liquidated damages.”<sup>154</sup> Additionally, the DOT’s proposal “mandate[s] disclosure of the criteria used for ‘bumping,’ and what substitute travel arrangements are offered. Armed with this information, consumers can choose the airlines that provide the best for travelers in these situations.”<sup>155</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> McFadden Statement, *supra* note 131.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See id.*

<sup>154</sup> *Id.*

<sup>155</sup> McFadden Statement, *supra* note 131.

Finally, in order to reduce the "gaming" associated with trying to find the lowest possible airfare, the DOT's proposal contains two requirements that will allow passengers to ensure that they have complete information regarding airfares. These requirements are: "until the 7-day period before flight, that a carrier that quotes a price for a ticket must maintain that price for a 48-hour period, or until the ticket is purchased if sooner" and "to assure that a purchaser who inquires whether the fare offered is the lowest fare the carrier offers will be advised whether other carrier outlets may offer lower fares."<sup>156</sup> The DOT designed these provisions so that carriers can restrict the right to refunds and are thus "not faced with rampant double-booking," while at the same time allowing passengers to make more informed decisions about which air fare is in reality the most affordable.<sup>157</sup>

The DOT's plan also calls for changes to current industry practice regarding lost or mishandled baggage.<sup>158</sup> In order to support Senate Bill 383's provision requiring that a carrier deliver a passenger's checked baggage during the 24-hour period after flight arrival, the DOT proposes raising the penalty for not doing so to \$10,000. This represents a significant increase from the current \$1,100 fine for a violation of most other aviation laws.<sup>159</sup> In addition, the DOT plan proposes publishing consumer complaint reports regarding baggage mishaps.<sup>160</sup> Finally, the proposal directs an immediate increase of the current minimum baggage liability level, doubling it from the current \$1,250 to \$2,500. This increase is subject to future increases for inflation and authorizes the Secretary to direct an increase if necessary.<sup>161</sup>

The DOT proposal differs significantly from House Bill 700, the proposed Passenger's Bill of Rights, regarding the treatment of code-sharing agreements.<sup>162</sup> The Department's proposal requires "that travelers are told at the time of ticket purchase the actual carrier that will provide the transportation, not just the name of a major carrier affiliate, and whether a change in aircraft will be required during a single flight."<sup>163</sup> In McFadden's

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

<sup>160</sup> *See id.*

<sup>161</sup> *See* McFadden Statement, *supra* note 131.

<sup>162</sup> *See id.*

<sup>163</sup> *Id.*

statement, she cautions that House Bill 700 “would flatly bar the use of a single flight number designation in cases where a change of aircraft occurs between segments of a flight. This goes far beyond our new disclosure rule and could have serious and negative unintended consequences.”<sup>164</sup>

McFadden concluded with a summary of the various proposals the general counsel addressed on behalf of the DOT.

S. 383 and the Administration’s initiative identify the same problems, but address them in a somewhat different manner. The Administration’s bill is based on disclosure and market forces increasing competition, with certain minimum assurances required by the airline. S. 383 is more of an enforcement-driven measure. In the end, we can work together to ensure that airline passengers receive fair treatment.<sup>165</sup>

e. Statement of Carol B. Hallett, President and Chief Executive Officer, Air Transportation Association of America

While there was sufficient support voiced for the Airline Passenger Fairness Act, several individuals spoke out against the proposal. Among these people was Carol B. Hallett, President and Chief Executive Officer of the Air Transport Association of America [ATA].<sup>166</sup> Ms. Hallett’s testimony was similar to the statement Robert Warren offered to the House of Representatives Committee on Transportation and Infrastructure concerning the proposed Airline Passenger Bill of Rights on behalf of the ATA.<sup>167</sup>

The ATA feels that, much like House Bill 700, Senate Bill 383 is unnecessary as airlines “share the same objective of providing the highest quality service to our passengers.”<sup>168</sup> The ATA finds fault with many of the proposed sections of the Airline Passenger Fairness Act. First, the ATA is opposed to permitting a passenger to use any portions of a ticket coupon, regardless of the reasons that other portions of the ticket are not used. Hallett’s

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See *Airline Passenger Fairness Act: Hearing on S. 383 Before the Senate Comm. on Commerce, Science, and Transp.*, 106th Cong. (1999) (statement of Carol B. Hallett, President and Chief Executive Officer, Air Transport Association of America) [hereinafter Hallett Statement]. The ATA’s members transport roughly 95% of passengers and goods transported by U.S. flag airlines.

<sup>167</sup> See *infra* III(B)(2)(b).

<sup>168</sup> Hallett Statement, *supra* note 166.



statement voices the ATA's opinion that by allowing passengers to do so, S. 383 may prohibit "someone who wants to get on one of those later segments because the airline is holding a seat for someone who has changed their plans and no longer will fill that seat."<sup>169</sup> The ATA feels that the scarcity of seats makes this result unjust to consumers who would be unable to obtain an otherwise empty seat on a flight if this practice were allowed.<sup>170</sup>

Secondly, the ATA does not feel that airlines should have to provide customers full access to all fares regardless of the technology that customers use to access fare information.<sup>171</sup> The ATA believes that if such practice is required from airlines, customers will be harmed because it may eliminate some lower-cost tickets. "If airlines were prohibited from offering such fares through means available to some and not others [Internet ticketing], we could not offer such deeply discounted tickets."<sup>172</sup>

Additionally, the ATA is against Senate Bill 383 because it would require carriers to provide notice to each passenger with a confirmed reservation that their flight will be delayed. The ATA feels that this requirement is too strict because of time constraints.<sup>173</sup> Hallet argued that "[t]his provision assumes that passengers provide multiple telephone numbers where they can be reached, that they are at one of those numbers and that airlines know sufficiently in advance that there will be a delay."<sup>174</sup> According to Hallett, "[w]here those assumptions are valid, the passenger is being notified today," thus the provision is unnecessary.<sup>175</sup>

The ATA is also strongly opposed to the provision of the Airline Passenger Fairness Act that would require carriers to refund the full purchase price of a ticket if so requested within 48 hours of purchase. Hallett provided two arguments to support the ATA's position: (1) most tickets purchased for other reasons (i.e., movie tickets, theater tickets, and tickets for sporting events) and items purchased on sale are generally non-refundable and (2) requiring such refunds will prevent airlines from offering discounts to passengers willing to buy non-refundable

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<sup>169</sup> *Id.*

<sup>170</sup> *See id.*

<sup>171</sup> *See id.*

<sup>172</sup> *Id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See* Hallett Statement, *supra* note 166.

<sup>175</sup> *Id.*

tickets.<sup>176</sup> Hallett added, “[w]e believe this choice allows passengers to get what they need without paying for what they don’t need. . . . Those harmed most by this provision would be those most price-sensitive and therefore most dependent on the availability of deeply discounted fares.”<sup>177</sup>

Finally, the ATA disagrees with the provision of the Airline Passenger Fairness Act that would require airlines to disclose information about frequent flyer programs such as the number of seats redeemable on each flight.<sup>178</sup> Hallett offered several reasons why this provision is ill-designed: frequent flyer programs are not required by law and there is no static number of frequent flyer seats, thus no reliable number of seats can be reported to consumers.<sup>179</sup>

#### IV. RESPONSE TO PROPOSALS

##### A. AIRLINE RESPONSE

###### 1. *Placing the Blame for Poor Customer Service*

As an industry, airlines feel that the measures proposed to improve customer service are inappropriate. Beyond the reasons enumerated in Congressional testimony, high-level airline executives claim that the primary reason for the current state of the United States air passenger service is outdated air traffic control systems.

The ATA has placed a major portion of the blame for poor airline service performance on what it views as an obsolete air traffic control system.<sup>180</sup> In the first few months of 1998, air traffic control delays increased over 81% from those in 1997. The ATA estimates the annual cost of these delays in roughly \$4.1 billion.<sup>181</sup> ATA president and CEO Carol Hallett stated:

It’s time for the government to do its part to reduce the massive air traffic control delays that are frustrating passengers nationwide. The present system was better suited to the traffic levels of the 1970s and cannot handle today’s demand, let alone meet the

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<sup>176</sup> See *id.*

<sup>177</sup> *Id.*

<sup>178</sup> See *id.*

<sup>179</sup> See Hallett Statement, *supra* note 166.

<sup>180</sup> See Air Transport Association, *Press Release: Airlines Call on Government to Improve Air Travel*, at <http://www.air-transport.org/public/news/447.asp> (Sept. 15, 1999).

<sup>181</sup> See *id.*

needs of the new century. As we approach the new millennium, we must have a state-of-the-art air traffic control system.<sup>182</sup>

In response, the Air Traffic Controllers Association blamed the airlines for the back-ups. "It's like trying to cram 10 pounds of sand into a five-pound bag . . . [i]f airlines continue to overbook runways, the passengers will continue to wait unnecessarily."<sup>183</sup> In order to back their assertions, the controllers cited examples from flight logs.<sup>184</sup> Not including a marked increase in regional and commuter air service, major U.S. airlines added roughly 600 flights per day in 1999.<sup>185</sup> "Due to passenger complaints, the airlines are faced with a congressionally mandated 'passenger bill of rights' and the air traffic control system is used as a convenient scapegoat for the airlines to protect their precious profits."<sup>186</sup>

## 2. *Customers First*

In order to avoid Congressional intervention, the Air Transport Association and its member airlines unveiled the Customer's First plan in June 1999.<sup>187</sup> This voluntary plan to improve customer service

is about making sure that all airline passengers receive the care, respect and information they deserve . . . Last year, more than 614 million people flew safely on U.S. airlines. Planes and airports are more crowded than ever and air traffic control delays are increasing. These factors often cause tempers to fray. We want to take definite steps to improve our service, so that we can improve air travel for all airline passengers.<sup>188</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> Glen Johnson, *Overscheduling Contributed to Airline Delays, Controllers Say*, AUSTIN AMERICAN-STATESMAN, Sept. 9, 1999, at C1 (quoting Randy Schwitz, Executive Vice President, National Air Traffic Controllers Association).

<sup>184</sup> *See id.* "On Thursday, July 29, airlines scheduled 57 takeoffs and landings during a 10-minute period around 6 p.m. at the Dallas/Fort Worth airport. The field's capacity was 35 operations — 22 fewer flights during that span; At the tower in Minneapolis, 44 takeoffs and landings were scheduled from 7 a.m. to 7:15 a.m. on Thursday, August 12, yet only 30 planes could have arrived or departed during that period." *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> *Id.*

<sup>187</sup> *See* CNN.com, *Airlines Detail 'Passenger Rights' Plans Amid Continuing Criticism*, at <http://www.cnn.com/TRAVEL/NEWS/9909/15/passenger.rights.asp> (Sept. 15, 1999) [hereinafter *Airlines Detail Plans*].

<sup>188</sup> ATA Press Release, *supra* note 13.

Customers First is a plan designed by the ATA that will be modified by individual airlines, with each airline's plan addressing twelve major points.<sup>189</sup> Among these points are:

- **Inform passengers of the lowest fare available.** Each ATA airline will quote the lowest available fare for which the customer is eligible on the airline's telephone reservation system for the flight and class of service requested.
- **Delay notification.** Airlines will notify customers of known delays, cancellations and diversions. Each airline will establish and implement policies and procedures for notifying customers at the airport and on board affected aircraft of information regarding delays, diversions and cancellations in a timely manner.
- **Complaints.** Each airline will assign a customer service representative responsible for handling passenger complaints and ensuring that all written complaints are responded to within 60 days.
- **Increase baggage liability limit.** ATA airlines have already petitioned the DOT to increase the current baggage liability limit of \$1,250 per bag to \$2,500. Airlines applaud the DOT for their quick action on this request.
- **Meet customers' essential needs.** During long on-aircraft delays, ATA airlines will make every reasonable effort to provide food, water, restroom facilities and access to medical treatment for on-board passengers who are on the ground for an extended period without access to the terminal.
- **Disclosure.** Each airline will make available the following to their customers: cancellation policies resulting from failure to use each flight coupon; rules, restrictions and an annual report on frequent flyer programs; and upon request, information regarding airline seat size and pitch.<sup>190</sup>

There are several instances of airlines individualizing the Customers First plan. Continental Airlines has promised to communicate with passengers more clearly about ticket prices, lost baggage, and flight delays. United Airlines' version of Customers First will provide "Mobile Chariots," battery-powered workstations that will make it easier for ticket agents to rebook passengers in cases of flight complications at its hub airports. United also pledged to provide 600 hand-held ticket scanners at its busiest airports so that travelers can find out the status of

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<sup>189</sup> *See id.*

<sup>190</sup> *Id.*

their baggage more quickly, and to install a toll-free customer complaint line.<sup>191</sup>

Customers First has two key dates, both of which have already passed. On September 15, 1999, all ATA airlines were required to file their individual plans with the DOT and each of these plans were to be fully implemented on December 15, 1999.<sup>192</sup>

## V. CONCLUSION

The Department of Transportation is poised to issue its report revealing the success of airlines in their customer service initiatives.<sup>193</sup> Almost one year ago, spokesman for the ATA David Fuscus asked passengers and Congress for patience. Fuscus predicted that “[w]hether it’s in the contracts of carriage or not, it won’t matter to the traveling public, because we are going to do these things.”<sup>194</sup> At that time Senator Jay Rockefeller offered his support to the ATA, stating “I think we ought to give them the chance.”<sup>195</sup>

The ATA maintained the viability of its initiative. “Airlines across the board have been working very hard to improve the experience of fliers out there. . . . We think that in the long run, this is going to be very good for passengers.”<sup>196</sup>

Others, however, felt like the airlines’ new plan is little more than “a rehash of existing law or aviation policy.”<sup>197</sup> Promises made by airlines that go beyond what is already required of them by the government are not included in the airlines’ contracts of carriage, the fine print found on the back of airline tickets that is the contract between customers and airlines, to which ATA spokesman Fuscus’s comments referred.<sup>198</sup> Thus, a report by the Congressional Research Service said that the airlines’ voluntary plans might not be as enforceable as contracts of carriage.<sup>199</sup> This lack of enforceability led Senator Ron Wyden

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<sup>191</sup> See *Airlines Detail Plans*, *supra* note 187.

<sup>192</sup> See *ATA Press Release*, *supra* note 13.

<sup>193</sup> Matthew L. Wald, *Report is Expected to Outline Persistent Airline Problems*, NY TIMES, at <http://www.nytimes.com/2001/01/29/national/29AIRL.html> (Jan. 29, 2001).

<sup>194</sup> *Airlines Detail Plans*, *supra* note 187.

<sup>195</sup> *Id.*

<sup>196</sup> CNN.com, *Early Reviews Mixed for Airlines’ Passenger Rights Plan*, at <http://cnn.com/2000/TRAVEL/NEWS/01/19/airlineservices/index.html> (Jan. 19, 2000) (quoting ATA spokesman David Fuscus).

<sup>197</sup> *Airlines Detail Plans*, *supra* note 187.

<sup>198</sup> See *id.*

<sup>199</sup> See *id.*

to label Customers First “nothing but legalistic gobbledygook, which [does] nothing to protect passengers . . . [the reports by the Congressional Research Service are] a real wake-up call showing how little protection the consumer really has.”<sup>200</sup>

Roughly a year later, Senator Wyden was unimpressed by the airlines' efforts. Wyden said that he is bracing himself “for another round of diversionary tactics that have as their principal goal keeping Congress from enacting an enforceable set of consumer protections.”<sup>201</sup> Thus, he plans to reintroduce the passenger bill of rights to Congress after the DOT's report is issued.<sup>202</sup> Whether Wyden's planned course of action will be necessary remains to be seen. But it is clear that, no matter through which avenue, voluntarily or governmentally mandated, airline passengers' rights must be protected.

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<sup>200</sup> *Id.*

<sup>201</sup> See Wald, *supra* note 193.

<sup>202</sup> *Id.*

